HARVARD

LAW REVIEW

VOL. XIV. MARCH, 1901. NO. 7

SEQUESTRATION OF WITNESSES.[1]

THE expedient of separating a party's witnesses, in order to detect falsehood by exposing inconsistencies, seems to have been early discovered and long practised in various communities. Though probably not in itself older or more widespread than some other fundamental notions of proof, nevertheless its age and universality have come to be more emphasized in our own legal annals because of the instance recorded and handed down in the apocryphal Scriptures. The story of Daniel's judgment in Susanna's case has given to this expedient a unique and classical place in our law as well as in our literature: —

The History of Susanna: "[Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly;] and the elders said: 'As we walked in the garden [of Joacim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when

[1] This term for the process of placing prospective witnesses out of the hearing of a testifying witness has precedent in the usage of Louisiana (37 La. An. 463), of Texas (3 S. W. 539), and of Georgia (Code Index, *s. v.* "Witness"), and seems preferable to any other; there is indeed no other single term in acceptance. In the Southern States, by an early usage of obscure origin, it is termed (*e.g.* in 2 Swan 257) "putting under the rule," the word "rule" being merely the original English term for "order of court."

we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.' Then the assembly believed them, as those that were the elders and judges of the people. . . . [But Daniel,] standing in the midst of them, said: . . . 'Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel.' . . . Then Daniel said unto them, 'Put these two aside, one far from another, and I will examine them.' So when they were put asunder one from another, he called one of them, and said unto him:[1] 'Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?' who answered, 'Under a mastick tree.' And Daniel said, 'Very well; thou hast lied against thine own head.' . . . So he put him aside, and commanded to bring the other, and said unto him,[2] . . . 'Now therefore tell me, under what tree didst thou take them companying together?' who answered, 'Under an holm tree.' Then said Daniel unto him, 'Well; thou hast also lied against thine own head.' . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people."

The story of Susanna's vindication, sanctioned as it was by its place in the Scriptures, came to serve as a powerful argument in English courts, after the spread of printing and the popularization of the Bible made the people at large familiar with it. From almost the beginning of our recorded trials, the story is found repeatedly cited, and was a favorite text of invocation for those who hoped in the same way to prove their innocence.[3] Meantime, however, it is

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[1] Here Daniel, in several lines of vituperation, prophesies the elder's downfall; it would seem that this indicates a desire to anger and confuse the witness, preventing him from recollecting the details of his story if he had invented one.

[2] Here again came disconcerting anathema.

[3] *Circa* 1460, Sir John Fortescue, L. C., in his De Laudibus Legum Angliæ, c. 21, dilates on the marvel of its success.

Other examples: 1603, Sir Walter Raleigh's Trial, Jardine Crim. Tr., I, 419 ("My lords, for the matter I desire, remember too the story of Susannah; she was falsely accused, and Daniel called the judges 'fools, because without examination of the truth they had condemned a daughter of Israel,' and he discovered the false witnesses by asking them questions"); 1683, Sidney's Trial, 9 How. St. Tr. 817, 861 (cited by Sidney, arguing for himself); 1684, Rosewell's Trial, 10 id. 147, 190; 1696, Cook's Trial, 13 id. 311, 348, note; Fenwick's Trial, ib. 537, 722; 1725, Braddon, Observations on the Earl of Essex's Murder, 9 id. 1229, 1278, 1283, 1294.

There appears to be no mention of it in the recorded trials about the time of the great dramatist's earlier life in London; but one likes to imagine that his "Daniel come to judgment" was inspired by the tale of some trial known to him in which

clear that the expedient already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law. It appears to have been customary to examine separately the secta-witnesses [1] and the transaction- and document-witnesses,[2] as well as other persons from whom a consistent story was expected in order to obtain legal action ;[3] and the process seems to have had substantially the same object and probative operation that we find in it to-day :

1318, *Anon.*, Pl. Ab. 351, col. 1, London :[4] "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time, how and when [an alleged deed of release was made], and other necessary circumstances touching the deed. . . . [Three of the four had said that] on a certain Thursday they all came together to the manor . . . and found there this said Richard, who showed them the said writing and said it was his deed. Each of them was asked, separately and by himself, at what hour they came there, and in what building in the manor Richard showed them the writing, and how he was dressed. One of them said that they came there in the morning before sunrise, and that the writing was shown to the four witnesses in the queen's chamber in the manor, and Richard was dressed in a German tunic *de medleto*, and was shod in white shoes. The second said that they came at six o'clock, and the writing was shown

appeal to this story had furnished a theme for popular discussion; it could not have been Raleigh's trial, for the lines in the "Merchant of Venice" had already been printed some three years.

[1] See instances from Bracton's Note-Book, cited in Thayer, Preliminary Treatise on Evidence, 14.

[2] See instances collected ib. 20, 22, 98; Pollock and Maitland, Hist. Eng. Law, II, 635, 637. To these add the following: 1158(?), Wallingford and Oxford *v.* Abbott Walkelin, Bigelow's Plac. Ang. Norm. 198, 201 (controversy over a right of market; a number of men of the county were chosen in order by their oaths to decide the claim, but "segregati, qui jurarent, diversis opinionibus causam suam confundebant," and their diversities are then stated in detail).

[3] The expedient was used in examining the summoners in a writ of mortdancester; Britton, b. iii. c. 10, § 9 (Nichols, ii. 92) (as to re-summons in mortdancester, where the tenant denies that he was first summoned, "let the summoners be examined, and if upon examination they are found to disagree in the circumstances of the summoning, let the tenant be adjudged quit as to the default, and the summoners in mercy. And if they are found to agree, then he may defend the summons by his law.") See also, for this, Fleta, b. v. c. 3, § 7; b. vii. c. 6, §§ 12, 13, 20. A good example of this practice with the summoners occurs in Bracton's Note-Book, pl. 10, where "omnes discordant adinvicem." Compare also the proceeding with the grand jury, quoted in Stephen, History of the Criminal Law, I. 258. In short, it would seem that the value of the practice was well understood on all hands, and that it was resorted to in any sort of proceeding in which it was appropriate.

[4] As quoted in Thayer, *ubi supra*, 99.

to the four witnesses at this hour in the hall of the manor. The third said that they came, all at the same time, at nine o'clock, and Richard showed them the writing in the stable of the manor and he had on a black cloak. The fourth witness, William de Codinton, said that he never came to the manor with the said three witnesses, and never knew or heard of the making of the writing" except from the others' report. And judgment was given against the deed.

It was natural enough, when trial by jury had developed and the jurors had come to rely much upon the testimony of witnesses brought into court before them (that is, perhaps, after the 1400's [1]), that the ancient expedient should continue to be applied in these new conditions. From the beginning of this epoch, and onwards, it is clear that the practice was well known and often used.[2] There is perhaps no testimonial expedient which, having as long a history, has persisted in this manner without essential change.

The employment of this practice of course crossed the water with the common law. To-day, in many jurisdictions of the United States, statutes have expressly (though unnecessarily) made provision for sequestration, usually concerning its employment before committing magistrates; and occasionally the statute serves to determine one of the mooted points hereafter to be noticed.[3]

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[1] Thayer, Preliminary Treatise, 122.

[2] Examples: *Circa* 1460, Fortescue, De Laudibus Legum, c. 26; 1571, Duke of Norfolk's Trial, Jardine's Crim. Tr., I, 191; 1600, Earl of Essex's Trial, ib. 349; 1665, Guilliams *v.* Hulie, 1 Sid. 131; 1684, Rosewell's Trial, 10 How. St. Tr. 147, 160; 1696, Charnock's Trial, 12 id. 1396; 1754, Canning's Trial, 19 id. 330; 1775, Trial of Maharajah Nundocomar, 20 id. 934; 1793, Hudson's Trial, 22 id. 1021.

[3] *Ariz.* P. C. § 1346 (committing magistrate may exclude all witnesses while one is examined, and may also cause them to be kept separate); § 1347 (he may also on defendant's request exclude all persons except prosecutor, counsel, officers having defendant in custody, and clerk).

Ark. Stats. 1894, § 1995 (on accused's request, committing magistrate may exclude all persons except clerk, peace officer, prosecutor, accused, parties' attorneys, and witness under examination); § 1996 (he may also cause the witnesses to be kept separate from each other and out of hearing of the witness deposing); § 2963 ("If either party require it, the judge may exclude from the court-room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witness").

Cal. P. C. § 867 (committing magistrate "may exclude all witnesses who have not been examined; he may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined"); § 868 (he "must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody"); C. C. P. § 2043 ("If either party requires it, the judge may exclude from the court-room any witness of the adverse party").

Conn. Gen. St. 1887, § 2016 (coroner may sequestrate witnesses).

Probative Purpose and Operation. The process of sequestration consists merely in preventing one prospective witness from

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Ga. Code, 1895, § 5280, Cr. C. § 1017 ("In all cases, either party has the right to have the witnesses of the other party examined out of the hearing of each other; the court will take proper care to effect this object as far as practicable and convenient; but any mere irregularity shall not exclude the witness").

Ida. Rev. St. 1887, § 6075 (like Cal. C. C. P. § 2043); § 7574, 7575 (like Cal. P. C. §§ 867, 868).

Ill. Rev. St. c. 361 (committing magistrate may exclude, during a witness's examination, other witnesses, or separate the witnesses so that they cannot converse with each other until they have been examined).

Ia. Code 1897, § 5225 (committing magistrate may exclude all witnesses except the one testifying, and may cause witnesses to be kept separate); § 5226 (he must also exclude on defendant's request all persons except the attorneys and certain officers).

Kan. G. S. 1897, c. 102, § 50 (committing magistrate may in discretion exclude all witnesses not being examined, and "may direct the witnesses for or against the prisoner to be kept separate so that they cannot converse with each other until they shall have been examined").

Ky. C. C. P. 1895, § 601 (judge may order separation, not to include parties or court officers); C. Cr. P. §§ 62, 63 (committing magistrate may order separation, and must on request of either party; but not so as to exclude the defendant, his counsel, or the prosecutor).

Mass. St. 1894, c. 536, § 4 (separate examination authorized, in proceeding to free a person under restraint, of the person and of witnesses); St. 1895, c. 355, § 2 (same for witnesses in election inquest); St. 1894, c. 444, § 4 (same for fire marshal's inquest).

Miss. Comp. L. 1897, § 11852 (committing magistrate may sequestrate witnesses).

Minn. Gen. St. 1894, § 7145 (committing magistrate may in discretion exclude all witnesses not testifying, and may direct "the witnesses for or against the prisoner to be kept separate" until examined).

Mont. P. C. §§ 1678, 1679 (like Cal. P. C. §§ 867, 868); C. C. P. § 3371 (like Cal. C. C. P. § 2043).

Nebr. Comp. St. 1899, § 7026 (committing magistrate, "if requested, or if he sees good cause," shall order separate examination, and separation of witnesses on one side from those on the other).

Nev. Gen. St. 1885, § 4043 (during defendant's examination before committing magistrate, witnesses on either side shall not be present; and magistrate may exclude all unexamined witnesses during examination of one, and may cause witnesses to be kept separate and be prevented from conversing with each other until all are examined); § 4044 (he shall on defendant's request exclude all persons except clerk, prosecutor and counsel, attorney-general, district attorney of county, defendant and his counsel, and officer having him in custody).

N. H. Pub. St. 1891, c. 252, § 11 (sequestration allowable on preliminary examination by magistrate).

N. M. Comp. L. 1897, § 3384 (committing magistrate may exclude all unexamined witnesses during another's examination, and may keep witnesses apart and prevent them from conversing until all have been examined).

N. Y. C. Cr. P. § 202 (committing magistrate may sequestrate witnesses while others are examined, and must do so while defendant is examined).

N. C. Code, 1883, § 1149 (before committing magistrate, no witnesses are to be present during accused's examination; during any witness' examination, others may be sequestrated).

hearing another's testimony.[1] But the probative service thereby rendered is somewhat different according as the witnesses separated are called for opposing parties or for the same parties.

(1) If the hearing of an *opposing witness* were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is purely preventive; *i. e.* it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony.

N. D. Rev. C. 1895, §§ 7958, 7959 (like Cal. P. C. §§ 867, 868, adding, "and such other person as he may designate" after "defendant and his counsel").

Oh. Rev. St. 1898, § 7148 (committing magistrate may "if requested, or if there is good cause therefor," order separation of witnesses).

Or. C. C. P. § 831 (like Cal. C. C. P. § 2043); C. Cr. P. § 1601 (committing magistrate "may exclude the witnesses who have not been examined during the examination of the defendant or during the examination of a witness for the State or the defendant").

Tenn. Code, 1896, § 5599 (party is not to be put under the rule when he is a witness); § 7020 (committing magistrate may sequestrate witnesses).

Tex. C. Cr. P. 1895, § 699 (at either party's request, witnesses on both sides may be removed so as not to hear testimony of any other witness); § 700 (those on one side may or may not be separated from those on the other, as court directs); § 701 (party requesting separation may designate some or all for the purpose); § 702 (witnesses thus sequestrated are to be instructed not to converse about the case nor to read reports of testimony).

Utah Rev. St. 1898, § 3477 (like Cal. C. C. P. § 2043); §§ 4668, 4669 (like Cal. P. C. §§ 867, 868); § 696 (exclusion of spectators in trials involving indecencies; "provided that in any cause the court may in its discretion, during the examination of a witness, exclude any and all other witnesses in the cause").

Vt. Stats. 1894, § 1235 (separation allowable in discretion, on demand of either party, in county court); § 1982 (separate examination of witnesses demandable by either party in criminal cases).

Va. Code, 1887, § 3967 (witnesses may be sequestrated by committing magistrate).

W. Va. Code, 1891, c. 155, § 13 (committing justice may sequestrate witnesses).

Wis. Stats. 1898, § 4788 (committing magistrate may in discretion exclude witnesses other than the one examined, and may cause the separation of "the witnesses for or against the prisoner").

Wyo. Rev. St. 1887, § 3172 (like Oh. Rev. St. § 7148).

[1] 1460, Fortescue, De Laudibus Legum Angliæ, c. 26 ("And if necessity requires, the witnesses may be separated, until they have testified to whatever they intended, so that what one says shall not instruct or warn another how to testify consistently"); 1824, Kirkpatrick, C. J., in State *v.* Zellers, 7 N. J. L. 226 ("The less a witness hears of another's testimony, the more likely he is to declare his own knowledge simply and unbiased"); 1872, Freeman, J., in Wisener *v.* Maupin, 2 Baxt. 342, 357 ("The object being to prevent the witnesses with feelings interested from being prepared to meet the statements of witnesses already made, and to compel them to rely on their own memory for the accuracy of their statements without being warped or influenced in their statements by what they have already heard deposed").

(2) But the separation of *witnesses on the same side* may do something more than this. It is equally preventive, in that it deprives the later witness of the opportunity of shaping his testimony to correspond with that of the earlier one. But it is, additionally, detective in its effects; *i. e.* it exposes their difference of statement on points in which, had they truly spoken, they must have made identical statements. This variance of statements is the significant achievement of the witnesses' separation, and seems to rest for its probative cogency on two salient circumstances, namely, that the witnesses speak upon the same side, and that the subject of their statements is the details of a single occurrence. (*a*) The first circumstance serves to remove uncertainty, by fixing unmistakably upon one party's case the whole burden of error. Where two persons, claiming to have been present on the same occasion with equal opportunities of observation, are called upon opposite sides and contradict each other, the contradiction does not of itself establish anything; it may indicate that one of the two is falsifying, but it does not indicate one rather than the other as the falsifier; it is still open to either side to claim its witness as the truthful one, so that neither side is clearly fixed with the error or falsity. But where both speak for the same party, contradicting each other, it is manifest without anything further that the error is upon that particular side; the result is achieved by mere comparison of statements, without the necessity of first granting credit to an opposing witness and without any of the troublesome uncertainty which arises from being forced to weigh their respective credits. (*b*) The second circumstance, mentioned above, emphasizes the probability of a downright manufacture of testimony. The truth of the main fact is put forward by the party as confirmatively established by the harmony of their joint testimony; and, where two persons come purporting to have observed the same event in the same way, the details of that fact, necessarily and equally open to their observation at the same time, ought to produce the same harmony of impression, and therefore of testimony. If, then, that harmony disappears upon further questioning as to these details, one of two inferences follows: Either (1) there is an honest mistake, in observation or in memory, on the part of one; but the former is less likely to the extent that the one fact was necessarily connected in observation with the other,[1] and the latter is almost impossible where (as is usual) the

[1] The well-known and common deceptions of the senses (as expounded in Mr. Sully's treatise on Illusions and elsewhere) need not here be taken into account, because usually they may be supposed to have affected both witnesses equally.

statements are positive, and therefore mere failure of memory does not serve to explain; moreover, even an honest mistake as to details shows the probability of a mistake on the main fact. Or, (2) there is a collusive arrangement, or a deliberate intention by one, to testify falsely; for if, on connected matters of detail, which by the operation of the senses ought equally to have produced identical impressions and therefore identical statements, there is no harmony, then the apparent harmony of statement on the principal fact can be explained only [1] as artificial, *i. e.* as the result of an individual plan or a combination to manufacture false testimony. This not only discredits one or both of the witnesses in all their testimony, but also throws suspicion on the entire mass of evidence of that party, if this fabrication by the witnesses may seem to have been known to him. More concisely and less accurately: If matters A, B, C, and D must have happened together, then a disagreement as to the tenor of matters B, C, and D, by witnesses called on the same side to prove A, indicates probable perjury by one or more as to A, and possible subornation of perjury by the party.

The weight of this exposure of contrary statements is of course diminished according to the degree of possibility of honest mistake, which in turn depends upon the necessariness of connection between the facts testified to and upon the extent to which one or more of the witnesses venture positive statements as to details. Moreover, the expedient is not invariably successful even where perjury does exist, because either a concerted working out of false details, or a cautious failure of memory, beyond the circle of the main fact, may sometimes baffle all efforts at detection. But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism; for, while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it.

From the following passages some illustrations of its operation may be gathered: —

1679, *Kerne's Trial*, 7 How. St. Tr. 707, 709; charge of being a priest;

[1] Except for the alternative (1) *supra*.

two women, Edwards and Jones, were offered to testify to hearing him say mass. Defendant: "I desire to ask her what discourse she had with Mary Jones, the other witness, for she has been instructing her what to say, and that they may be examined asunder;" which was granted. L. C. J. Scroggs: "Did she [Jones] tell you what she could say?" Edwards: "She did." L. C. J.: "What?" Edwards: "She went once to hearken, and she heard Mr. Kerne say something in Latin, which she said was mass." L. C. J.: "Call the other woman; you shall now see how these women agree." Clerk: "Call Mary Jones." L. C. J.: "Let the other woman [Edwards] go out. . . . What did you tell her you could say?" Jones: "I told her . . . he said somewhat aloud that I did not understand." L. C. J.: "Did you not tell Margaret Edwards that you heard him say mass?" Jones: "No, my lord." L. C. J.: "Call Margaret Edwards again. Margaret Edwards, did Mary Jones tell you that she heard Mr. Kerne say mass?" Edwards: "Yes, my lord." Jones: "No, I am sure I did not, for I never heard the word before, nor do not know what it means." L. C. J.: "So they contradict one another in that."

1683–1725, *Braddon's Observations on the Earl of Essex's Murder*, 9 How. St. Tr. 1229, 1276; the Earl of Essex, in 1683, suspected of plotting with Protestants against Charles II, had been found dead in the Tower with his throat cut; it was given out as a suicide; but Braddon collected much evidence to prove that a band of ruffians, hired by the Papist Duke of York, who succeeded in 1685 as James II, had murdered the Earl; three of the guards had deposed, however, to giving the Earl a razor at his request just before his death. Braddon, who was convicted of seditious libel, afterwards published a defence, in which the guards' story is thus dealt with: "That this story, of the delivering the razor to my lord a little before his death, is the forgery of those who were privy to my lord's murder, appears very plain from the notorious contradictions as to the time of delivering this razor to my lord [for one said he delivered it the day previous, another put it at the early morning of the same day, and the third at a few moments before his death]. . . . If any gentleman shall say that all these three attendants upon my lord at the time of his death agree in this, viz. that there was a razor delivered to my lord when prisoner in the Tower, and that their contradictions are only in the point of time when this razor was delivered to his lordship — it is true they are [only] circumstantial contradictions in the *time* of delivering this razor to my lord of Essex. And the contradiction of the two elders, in their charge of adultery against Susanna, was only in point of the *place* where they took Susanna in adultery. For the first of those elders swore that they took Susanna in adultery under a mastick-tree; but the second swore it was under a holm-tree; but both these conspiring accusers agreed in the main, viz. that they took her in adultery. Yet nevertheless, by their contradictions as to the tree under which they

pretended to have taken her in adultery, Daniel convinced the whole court, which before had rashly condemned Susanna, that those two conspiring accusers had falsely sworn against Susanna. . . . And I never yet heard any person deny Daniel's wisdom and justice in this detection. . . . [Had the coroner, in the Earl's case, caused the three guards to be separately examined and their contradictions been exposed, then the jury must have believed] that they were all three pre-engaged falsely to swear what might influence the coroner and his jury to believe that my lord himself cut his own throat. . . . That those warders and servant, who would have proved my lord *felo de se*, have for that purpose sworn what is false in every material part of their evidence, doth plainly appear from this one consideration or maxim relating to proofs, viz.: When two or more who pretend to be co-witnesses to a fact shall contradict one another in some material circumstance relating to that fact, those contradictions strongly conclude that they have sworn falsely."

1685, *Oates' Trial*, 10 How. St. Tr. 1079, 1158; in this trial the notorious perjurer was at last brought to book; the case turning upon the truth of Oates's statement that he was in London on a certain day, and his witnesses having differed widely in their description of his dress when he was seen by them, Oates complained: "What does it signify, my lord, whether the wig were long or short, black or brown?" L. C. J. Jeffreys replied: "We have no other way to detect perjuries but by these circumstances, . . . as in a controversy about words, were they spoken in Latin or in English, and so to all places and postures of sitting, riding, or the like; as you know the perjury of the elders in the case of Susanna was by their different testimony in particular circumstances discovered."

Demandable as of Right. A difference of judicial opinion exists as to whether sequestration is demandable as of right, or is grantable only in the trial Court's discretion. It seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defence that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, in the case when it is really useful (namely, a combination to perjure), it is almost the only hope of an innocent opponent. After all is said and done, the fact remains (as Sir James Stephen has declared, out of a lengthy experience as a criminal judge [1]) that successful perjury is always a possible feature of human justice. No rule, therefore, should ever

1 Hist. Crim. Law, I, 403 ("Under particular circumstances, no really effectual protection against perjury ever has been or ever can be devised").

be laid down which will by possibility deprive an opponent of the chance of exposing perjury. Finally, it cannot be left with the judge to say whether the resort to this expedient is needed; not even the claimant himself can know that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance, if *he* thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable: —

1870, *Sneed*, J., in *Rainwater* v. *Elmore*, 1 Heisk. 363, 365: "The lawyer who has practised long in jury cases cannot have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice. Human nature is frail, and that frailty is as often illustrated in the witness box as elsewhere. The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. . . . [He often] lapses into the conviction that the scene before him is a mere tilt and tourney, in which he enters to overturn and countervail the testimony of the adverse party. He has heard the evidence of his own party in regard to the transaction, and perhaps he remembers it somewhat differently; but a conflict would be fatal, and he often reasons his flexible conscience into the opinion that his own memory is at fault and the statement of his confederate is the true version; and he therefore corroborates it. He has heard the testimony of the adverse party, and his ingenuity is taxed at once to strike it where it is vulnerable and to destroy it; a brief and whispered conference behind the bar, and he finds one of his own party who saw the transaction as he saw it; and the thing is done. Of what value is cross-examination — that most efficacious test of truth — under such circumstances? The witness who is disposed to ignore the truth may now defy the onset of the most skilful cross-examination; and even he who would fain lean towards an honest story finds himself confounded, and often yields his own conviction, to adopt the strong, emphatic statements of another. The object of the trial is to elicit the truth; but under such circumstances and in an excited controversy the truth is as often smothered as disclosed. . . . This doctrine, that upon the mere motion or suggestion of a party it does not seem a matter of right [to order the witnesses' separation], appears to be traceable to the darker ages of English jurisprudence. . . . We have no hesitation in declaring that such a doctrine cannot stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial guaranteed by the laws to the citizens of this country."

The most that ought to be conceded to the judge is to refuse an order of sequestration where it does not appear to be asked in good faith, *i. e.* not in the honest hope of exposing false testimony, but merely to obstruct the trial or to embarrass the opponent's management of his case.

A few Courts concede that sequestration is demandable as of right ;[1] but the remainder, following the early English doctrine,[2] hold it grantable only in the trial Court's discretion ;[3] declaring

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[1] 1837, R. *v.* Murphy, 8 C. & P. 307 ("almost a right for the opposite party"); 1852, R. *v.* Newman, 3 C. & K. 260 (ordered if the opponent insists, even where the witness is also the prosecutor); 1874, Meeks *v.* State, 51 Ga. 429, 432, *semble ;* 1897, Shaw *v.* State, ib. 29 S. E. 477; 1871, Walker *v.* Com., 8 Bush 86, 89, 96, *semble ;* 1881, Salisbury *v.* Com., 79 Ky. 425, 432; 1824, State *v.* Zellers, 7 N. J. L. 224 ("the strict rule is that they [defendant's witnesses] should be out of court [during the prosecution's testimony]"); 1852, Nelson *v.* State, 2 Swan 237, 257; 1870, Rainwater *v.* Elmore, 1 Heisk. 363 (see quotation *supra ;* but the motion must be supported by affidavit); 1869, Gregg *v.* State, 3 W. Va. 705, 709; more than a dozen other jurisdictions reach the same result by statute (*ante*, p. 478).

[2] 1696, Cook's Trial, 13 How. St. Tr. 311, 348 (L. C. J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity"); 1696, Vaughan's Trial, ib. 485, 494 (L. C. J. Holt: "You cannot insist upon it as your right, but only a favour that we may grant"); 1741, Goodere's Trial, 17 id. 1003, 1015. It was said, however, to be granted as of right to the crown: yet this is doubtful. That it should be treated as a mere favor to the accused was natural enough in the 1600's, when the accused could not as of right have his own witnesses sworn or even called. In the taking of evidence before the Houses of Parliament there was sequestration as a matter of course for all cases: 1811, Berkeley Peerage Trial, Sherwood's Abstract, 151; 1828, Taylor *v.* Lawson, 3 C. & P. 543.

[3] Besides the following rulings, the statutes cited *supra* have often a bearing; 1849, McLean *v.* State, 16 Ala. 672, 673; 1867, Wilson *v.* State, 52 id. 299, 303 (but "should rarely if ever be withheld"); 1898, McClellan *v.* State, id. 23 So. 653; 1897, People *v.* McCarty, Cal. 48 Pac. 984; 1853, Johnson *v.* State, 14 Ga. 55, 62 (but intimating that it is the right of the prosecution); 1860, Errissman *v.* Errissman, 25 Ill. 136; 1850, Porter *v.* State, 2 Ind. 435 ("a favor, it is true, rarely refused"); 1898, Parker *v.* U. S., Ind. Terr. 43 S. W. 858; 1871, Hubbell *v.* Ream, 31 Ia. 289, 290 (but it is "rarely withheld"); 1900, State *v.* Davis, id. 82 N. W. 328; 1895, Kentucky Lumber Co. *v.* Abney, Ky. 31 S. W. 179; 1899, Baker *v.* Com., id. 50 S. W. 54; 1893, State *v.* Hagan, 45 La. An. 839, 840; 1892, Com. *v.* Follansbee, 155 Mass. 274, 277; 1893, Com. *v.* Thompson, 159 id. 56, 58; 1882, People *v.* Hall, 48 Mich. 482, 487, *semble ;* 1887, People *v.* Burns, 67 id. 537; People *v.* Machen, id. 59 N. W. 664; 1895, People *v.* Considine, id. 63 N. W. 196; 1895, Johnston *v.* Ins. Co., id. 64 N. W. 5; 1860, State *v.* Fitzsimmons, 30 Mo. 236, 239; 1895, State *v.* Duffey, id. 31 S. W. 98; 1884, Binfield *v.* State, 15 Neb. 484, 487; 1996, Halbert *v.* Rosenbalm, 49 id. 498, 506; 1894, Murphy *v.* State, id. 61 N. W. 491; 1898, Chicago, B. & Q. R. Co. *v.* Kellogg, id. 74 N. W. 403; 1819, State *v.* Sparrow, 3 Murph. 487, *semble* (neither defendant nor prosecution may claim it as a right); 1881, People *v.* O'Loughlin, 3 Utah, 133, 144; 1851, Benaway *v.* Coyne, 3 Chandl. 214, 219.

usually, however, that in practice it is never denied, at any rate for an accused in a criminal case. There is no reason for a distinction between civil and criminal cases; successful perjury is an equally deplorable result, in whatever form it overwhelms its victims.

Mode of Procedure. (1) The *time* for sequestration begins with the delivery of testimony upon the stand and ends with the close of testimony. It is therefore not appropriate during the reading of the pleadings or the opening address of counsel;[1] any danger of improper suggestions at such times is to be dealt with in other ways. It continues for each witness after he has left the stand,[2] because it is frequently necessary to recall a witness in consequence of a later witness's testimony. It need not be demanded at the very opening of the testimony; at any time later, when the supposed exigency arises, the order may be requested.[3]

(2) The sequestration may be asked for by *either party*.[4] But even though the party sees no exigency or does not care to incur the enmity of some opposing witness, or for other reasons fails to ask, the order may be made at the request of the *jury*,[5] or by the *judge* of his own motion.[6]

(3) The *notification of withdrawal* is accomplished either by furnishing a list to the sheriff specifying the witnesses on either side and obtaining an order from the Court directing him to take them apart; or, more simply, by obtaining an order notifying all prospective witnesses to withdraw from the court-room: —

1858, *Hanly*, J., in *Golden* v. *State*, 19 Ark. 590, 598: "The course in such case is either to require the names of the witnesses to be stated by the counsel of the respective parties by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw by an order from the bench accompanied with notice that if they remain they will not be examined."

1833, *Gantt*, J., in *Anon.*, 1 Hill S. C. 251, 254: "It is usual and proper, as was done in this case, to furnish a list so as to enable the sheriff to

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[1] 1851, Benaway *v.* Coyne, 3 Chandl. Wis. 214, 219. The following ruling seems unsound: 1876, Penniman *v.* Hill, 24 W. R. 245, Hall, V. C. (not granted during the reading of affidavits).

[2] 1874, Roach *v.* State, 41 Tex. 261, 263.

[3] 1837, Southey *v.* Nash, 7 C. & P. 632 (here, after the demandant's own witnesses had testified).

[4] This is assumed on all hands; the statutes cited *ante* usually mention it.

[5] 1681, Earl of Shaftesbury's Trial, 8 How. St. Tr. 759, 778.

[6] 1867, Wilson *v.* State, 52 Ala. 299, 303; 1880, Ryan *v.* Couch, 66 id. 244, 248.

see that they withdraw. But the parties may, if they choose, decline making out lists, and by doing so they would be under the obligation of keeping their respective witnesses out of court. . . . But there is no necessity to put down the names of witnesses who are not in attendance; when they do attend, the party intending to swear them must either put their names on the list or see that they do not come into court before they are called to testify."

(4) The process itself involves three parts: (a) preventing the prospective witnesses from consulting each other; (b) preventing them from hearing a testifying witness; (c) preventing them from consulting a witness who has left the stand; the last including consultation between witnesses who have left the stand, since they are still prospective witnesses.[1]

The first element is possibly not of great importance, because before trial there has been already unrestrained opportunity for consultation; the second element is the vital one; the third is scarcely less important. The prevention applies equally as between opposing witnesses and between witnesses for the same party; though (as explained already) it is the collusion of the latter that is mainly to be prevented. The prevention is accomplished usually by placing all the witnesses in a room separate from the trial-room, under charge of an officer, who is to restrain their departure and prohibit their conversation. This simple machinery enforces the rule in all three parts of its operation. Under varying conditions, the rigor of the rule in these details may no doubt be relaxed in the trial Court's discretion.[2] But nothing should sanction any indirect method of conveying to the prospective witnesses information of the testimony already given. For example, it would seem obvious to good sense that the perusal of journals reporting the testimony should be forbidden.[3] On the other hand, repeating hypothetically upon examination the possible words of a former witness without suggesting whether he actually used them,

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[1] These three parts are sometimes set forth in the statutes cited, *ante*, § 1837, though commonly only the first two are in terms stated; but the first, as ordinarily stated, includes the third. In judicial decisions these elements of the process are rarely stated in detail, but there can be no doubt that the common-law rule implies all three.

[2] 1896, Broyles *v.* Prisock, Ga., 25 S. E. 388 (the trial Court has discretion as to the instructions to be given to witnesses as to not communicating during adjournment); 1852, Nelson *v.* State, 2 Swan 237, 256 (whether they shall be locked up continuously, or be ordered to keep out of the court-house, or be allowed to disperse for meals, depends upon the trial Court's discretion).

[3] *Contra:* 1861, Com. *v.* Henry, 2 All. 173, 176. The Texas statute provides against this.

may be allowable.[1] Whether an attorney in the cause may consult with a sequestered witness has been the subject of some difference of opinion;[2] the possibilities of abuse by unscrupulous persons (and by hypothesis there is about to be perjury, *i. e.* the rule is most needed for unscrupulous persons) are certainly great; and it seems clear, first, that it may not be done without leave of Court, and, secondly, that it may be done only aloud and in the presence of a court-officer; an honest attorney can hardly fear such regulations.

Persons to be included in the Order. (1) The *party demanding the sequestration* may not object to the Court's omission of certain persons from the rule. No doubt the exclusion of all may sometimes be vital to his plan; but no doubt also it usually is not; and the possibilities of abuse, by indiscriminate exclusion, would be so great that the omission of individuals from the rule may properly be left to its trial Court's discretion, without doing violence to the doctrine that sequestration, as a general principle, is demandable of right. It seems to be universally conceded that the trial Court may authorize individual omissions.[3]

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[1] 1900, State *v.* Taylor, S. C., 34 S. E. 939 (witnesses may be told, "either correctly or incorrectly, what another witness on the same side has testified to, with a view to test the correctness of the memory or the honesty of the witness;" here the question was allowed, "If your husband says . . . is he telling the truth or a falsehood?").

[2] 1890, Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 814 (whether an agent assisting in the cause may not for some purposes consult with the witnesses without leave, not decided); 1871, Williams *v.* State, 35 Tex. 255 (attorney may confer with the witness, while under the rule, "in a proper manner"); 1877, Brown *v.* State, 3 Tex. App. 294, 310 (conference is allowable only when held in the presence of an officer of the court); Jones *v.* State, ib. 150, 153 ("the better practice" is to confer only in the presence "or at least by permission of the Court"); 1879, Davis *v.* State, 6 id. 196 (conference allowable in trial Court's discretion); 1880, Holt *v.* State, 9 id. 571, 580 (same for conference by defendant); 1883, Dubose *v.* State, 13 id. 418, 426 (trial Court's discretion); 1883, Creswell *v.* State, 14 id. 1, 16 (same); 1885, Kennedy *v.* State, 19 id. 618, 631 (same).

[3] Besides the following rulings, the statutes cited *ante* frequently deal with this point: 1889, Riley *v.* State, 88 Ala. 193, 196; Barnes *v.* State, ib. 204, 208; 1893, Webb *v.* State, 100 id. 47, 52 (sheriff); 1899, Roberts *v.* State, id. 25 So. 238; 1892, Vance *v.* State, 56 Ark. 402 (expert witnesses to sanity); 1866, People *v.* Garnett, 29 Cal. 622 (excepting the chief of police); 1882, People *v.* Hong Ah Duck, 61 id. 387, 394; 1886, People *v.* Sam Lung, 70 id. 515 (Garnett case approved); 1859, Thomas *v.* State, 27 Ga. 287, 296; 1876, City Bank *v.* Kent, 57 id. 283; 1877, Turbaville *v.* State, 58 id. 545; 1891, Dale *v.* State, 88 id. 552, 557; 1893, Central R. Co. *v.* Phillips, 91 id. 526, 527; 1897, Shaw *v.* State, id. 29 S. E. 477 (though the exclusion is a right, the trial Court has a discretion; here the remaining of two witnesses to assist in the prosecution was held not improper); 1898, Keller *v.* State, id. 31 S. E. 92; 1851, Johnson

(2) The *party against whom the demand is made* has no right to the omission of any specific person, other than himself and his counsel, from the order of exclusion; the trial Court's discretion here also must control. For example, it cannot be insisted that members of the party's family[1] or expert witnesses[2] remain in court. Frequently, however, trial Courts sanction the omission of a prospective witness whose assistance in the management of the cause is under the circumstances indispensable.[3] Under the English practice, where the *attorney* has no official status in the trial, his case was no different from that of other witnesses, and the trial Court's discretion might include him in the order of exclusion;[4] on the other hand, it seems clear that a *counsel* would never have been excluded, though the question seems not to have arisen there, since ordinarily a counsel would not be a witness. But in the United States, where the functions of attorney and counsel are not separated, the rule for counsel would of course apply, and a counsel of record in the cause should be permitted as of right to remain.[5]

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v. State, 2 Ind. 652; 1874, State *v.* Baptiste, 26 La. An. 134, 136 (physicians); 1882, State *v.* Revells, 34 id. 381, 383; 1885, State *v.* Ford, 37 id. 443, 463; 1880, State *v.* Hughes, 71 Mo. 633, 636; 1895, State *v.* Whitworth, id. 29 S. W. 595 (father of the prosecutrix in a rape case); 1879, McMillan *v.* State, 7 Tex. App. 142, 144; 1881, Johnson *v.* State, 10 id. 571, 577 (medical experts); 1884, Spear *v.* State, 16 id. 98, 114 (same); 1886, Leache *v.* State, id. 3 S. W. 539; 1898, Dement *v.* State, Tex. Cr. 46 S. W. 917; 1898, Johnican *v.* State, id. 48 S. W. 181 (clerk of court); 1899, Buchanan *v.* State, id. 52 S. W. 769; 1881, People *v.* O'Loughlin, 3 Utah 133; 1877, State *v.* Hopkins, 50 Vt. 316, 322, 332 (here, the sheriff); 1886, State *v.* Lockwood, 58 id. 378 (deputy sheriff); 1886, State *v.* Ward, 61 id. 153, 179 (attorney not employed in the case); 1898, Jackson *v.* Com., Va. 30 S. E. 452.

[1] 1889, McGuff *v.* State, 88 Ala. 147, 150; 1879, People *v.* Sprague, 53 Cal. 491; 1894, May *v.* State, 94 Ga. 76; Hinkle *v.* State, ib. 595; 1886, Bond *v.* State, 20 Tex. App. 421, 437.

[2] 1899, Roberts *v.* State, Ala. 25 So. 238.

[3] 1848, R. *v.* O'Brien, 7 State Tr. N. S. 1, 45 (reporter to seditious speeches; being also engaged to report the evidence for the prosecution at the trial, he was not obliged to leave the court with the other witnesses; Blackburne, C. J.: "There is no stern rule of the kind; they are all subject to be modified by reasonable construction"); 1880, Ryan *v.* Couch, 66 Ala. 244, 248 (a witness who has "acquired such an intimate knowledge of the facts, by reason of having acted as the authorized agent of either of the parties, that his services are required by counsel," should not be excluded; here, the father of the absent plaintiff); 1893, Central R. Co. *v.* Phillips, 91 Ga. 526, 527.

[4] 1826, Pomeroy *v.* Baddeley, Ry. & Mo. 430 (Littledale, J., allowed an attorney to remain, "his assistance being in most cases necessary"); 1831, Everett *v.* Lowdham, 5 C. & P. 91 (Bosanquet, J., allowed him "under the circumstances" to remain).

[5] 1841, State *v.* Brookshire, 2 Ala. 303; 1872, Wisener *v.* Maupin, 2 Baxt. 342, 357. *Contra:* 1882, Powell *v.* State, 13 Tex. App. 244, 252 (depends on discretion). The statutes cited *ante* often expressly provide for this point.

The case of the *party himself* is more difficult. It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to expose it are most emphatic for a party who is a prospective witness.[1] On the other hand, the party's aid in the conduct of the cause may be indispensable, and his absence is in any case hardly consistent with his general right to protect his interests by watching the conduct of the trial; in the United States, or in most parts of it, these considerations (looking to the ordinary relations of client and counsel) are probably more forcible than in England, where the counsel has more independence and professional authority. The simple solution, avoiding both horns of the dilemma, would be to exempt the party from the order of exclusion, but to require him to take the stand first of the witnesses on his side; on the principle that, though he has the right to be present, yet he has also the duty to do all that is feasible towards preventing suspicion and subserving the opponent's right to sequestration. This particular solution, however, seems not yet to have been reached by any court.[2] A few courts treat the party upon the footing of other witnesses;[3] but others declare him entitled of right to remain,[4] and the latter view has been generally preferred in legislation.

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[1] 1872, Freeman, J., in Wisener *v.* Maupin, 2 Baxt. 342, 357 ("The reason of the rule applies with equal, if not more, force to their case than to the disinterested witness"); 1881, Hargis, J., in Salisbury *v.* Com., 79 Ky. 425, 432 ("He of all others, except the wilfully corrupt, is most obnoxious to the rule").

[2] But it has been suggested: 1874, Trippe, J., in Tift *v.* Jones, 52 Ga. 538, 542 ("It would be a proper rule that such party should be first examined, unless there be reasons to the contrary, in the absence of his other witnesses; this would preserve his right to be present in the court during the whole trial of his case").

[3] Besides the rulings in this note and the next, the statutes cited *ante* often make express provision: 1876, Penniman *v.* Hill, 24 W. R. 245 (Hall, V. C., said that parties may equally be excluded); 1879, Randolph *v.* McCain, 34 Ark. 696 (Eakin, J.: "It would be dangerous to give him, *as a matter of right*, exceptional advantages, when he of all others, if assailable at all by the temptation to concoct evidence, would have the greatest interest in doing so"); 1874, Tift *v.* Jones, 52 Ga. 538, 540, 542; 1881, Salisbury *v.* Com., 79 Ky. 425, 432 (prosecuting witness); 1872, Wisener *v.* Maupin, 2 Baxt. 342, 356 (the Tennessee statute cited *ante* was passed to override this decision; see the citation in the next note).

[4] 1853, Charnock *v.* Dewings, 3 C. & K. 378 (Talfourd, J., held "that on constitutional grounds he had no authority to order the defendants to leave the court so long as they behaved with propriety"); 1856, Constance *v.* Brain, 2 Jur. N. S. 1145; 1858, Selfe *v.* Isaacson, 1 F. & F. 194; 1880, Ryan *v.* Couch, 66 Ala. 244, 248; 1880, Chester *v.* Bowen, 55 Cal. 46, 48, *semble;* 1895, Kentucky Lumber Co. *v.* Abney, Ky. 31 S. W. 279 (but the chief officer of a corporation-party is not a party); 1892, Richards *v.* State, 91 Tenn. 723, 724 (exclusion of one co-defendant during testimony of another, improper); 1897, Lenoir Car. Co. *v.* Smith, 100 Tenn. 127 (an officer of a

Disqualification as a Consequence of Disobedience. If the order of exclusion is knowingly disobeyed, the Court unquestionably has the power to refuse to admit the disobedient person to testify; and it ought to exercise this power, in its discretion, whenever there appears any reason to believe that the proposed testimony was important, that the witness had heard the other testimony, and that he wished to know its tenor. It may be assumed that the power should not be exercised unless the witness, as above said, was aware of the order of exclusion;[1] for the burden of causing every witness to be notified, and thus of preventing inadvertent violation, may fairly be placed upon the party demanding the sequestration. But granting this much, it follows that the most appropriate and only effective means of enforcing an order of court and of securing the right of sequestration is to have it clearly understood that disqualification as a witness may follow disobedience: —

1874, *Trippe*, J., in *Bird* v. *State*, 50 Ga. 585, 589 (the counsel for defendant stated when the rule for separation was made that he had no witnesses, and was warned by the Court that if he brought any later they would be excluded; later, he brought two, whom he admitted were known to him when the order was made): "It was said a fine might have been imposed. That would not have vindicated the rule of law involved. . . . Either party would think it but poor compensation for the loss of an important right in a trial to have the other party or counsel fined. Courts should have summary power to enforce the rules of law in such cases, so that by their practical working they may be vindicated in all their integrity. If any right were lost, it was wilfully and defiantly thrown away."

There is, no doubt, something to be said against this rigorous doctrine, at least where the disobedience has occurred without any connivance of the opposing party and solely through the witness's own contumacy: —

1840, *Napton*, J., in *Keith* v. *Wilson*, 6 Mo. 435, 441: "Will it be contended that a party is bound to watch his witnesses to prevent their misconduct? . . . If a witness's contumacy be a sufficient ground to warrant the Court in excluding him altogether, notwithstanding it appears that it was through no connivance or default of the party to the suit, an unavail-

corporation "charged with the duty of looking after its interests in a pending trial" is within the statute giving parties the right to remain; otherwise "corporations will be excluded from its benefits altogether"); 1899, Heaton *v.* Dennis, ib. 52 S. W. 175 (principal beneficiary under a will is a party, under the statute). The party's obedience to an improper order of exclusion does not prevent him from taking advantage of his objection: Heaton *v.* Dennis, *supra*.

[1] And there must of course have been an express order of sequestration; 1883, R. *v.* Furley, 3 State Tr. N. S. 543, 564.

ing and reluctant witness might, by wilful and intentional disobedience to the order, at any time deprive the party of the benefit of his testimony."

1849, *Caldwell*, J., in *Laughlin* v. *State*, 18 Oh. 99, 102: "When we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials; the questions that may arise on the trial that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify, — these, and other considerations which might be presented, render it difficult and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony for the fair presentation of their cause."

1880, *Crawford*, J., in *Rooks* v. *State*, 65 Ga. 330: "To exclude him might deny the party of the testimony of the only person in the world by whom he could prove his innocence."

1883, *Elliott*, J., in *Davis* v. *Byrd*, 94 Ind. 525 (dealing with a case where the party himself was entirely innocent): "It is difficult to imagine any principle of law which will justify the punishment of an innocent party for the contumacious behavior of a witness. A litigant has no authority over the witnesses subpœnaed by him, and is not answerable for their wrongful conduct, and he ought not to be denied a right because a wrong has been committed for which he is neither morally nor legally responsible. It may be a very serious punishment to be deprived of the testimony of a witness; and if the party himself is free from fault, this punishment should not be visited on him."

But there are several answers to these arguments. In the first place, the fact that the opposing party would be deprived of valuable testimony is in itself no wrong, provided he himself has by connivance invited it. In the next place, it is usually very difficult to prove this connivance, and to require it proved might entirely nullify the rule. Again, if the witness is in fact open to the charge of fraudulent evasion, he is an unsafe and untrustworthy witness; a party has no absolute right to the testimony of a trickster, and he cannot complain, even though himself innocent, at the loss of tainted testimony; the argument of some of the judges above quoted erroneously assumes that the party could successfully prove something in his favor by a witness whose conduct has already suggested the strong probability that he will falsify. Furthermore, of two innocent parties, the contingency of suffering should clearly be for him whose witness has been in fault; and this is particularly so where it was also that party's duty, at whatever inconvenience, to secure the obedience of his own witnesses to a plain and simple

order of court. The refusal to admit to testify need of course not be an absolute and peremptory consequence of disobedience. No one has ever contended for this; the trial Court, on all the circumstances, is to determine whether this measure should be taken. But it seems clear that the Court may properly take the measure in its discretion, even where no connivance by the party is made to appear.

The difference of judicial opinion in the precedents arises chiefly over the case of a witness's wilful disobedience without the party's connivance. The English rulings have fluctuated, and the question seems there not to be settled.[1] In the United States, the great majority of Courts hold in general that the Court may in discretion disqualify the witness; some of these Courts, however, making the proviso that the party must have connived.[2] The other

[1] 1775, Cardigan Case, 3 Doug. El. C. 2d ed. 174, 229 (may be excluded); 1776, Worcester Case, ib. 239, 265 (same); 1790, Doe *v.* Cox, Cliff. El. C. 114 (Gould, J., refused to admit the witness, but the court in banc held this erroneous); 1819, R. *v.* Webb, per Best, J., cited in 3 Stark. Evid. 1733 (may be excluded); 1821, Attorney-Gen'l *v.* Bulpit, 9 Price 4 (Exchequer; "It is a sacred and inflexible rule" that the witness shall be rejected); 1829, R. *v.* Boyle, 1 Lew. Cr. C. 325, Bayley, J., and others (must be admitted); 1829, R. *v.* Colley, M. & M. 329 (Littledale & Gasilee, J., held it discretional); 1830, Parker *v.* W. William, 4 Moo. & P. 480, 6 Bing. 683, C. P. (exclusion rests with the judge's discretion; the exchequer rule being conceded to require exclusion); 1831, Beamon *v.* Ellice, 4 C. & P. 585 (Taunton, J., admitted the witness, with hesitation); 1835, Cook *v.* Nethercote, 6 C. & P. 741 (Alderson, B., refused to exclude the witness); 1836, Thomas *v.* David, 7 id. 350 (Coleridge, J., said that it was "entirely in the discretion of the judge"); 1842, Chandler *v.* Horne, 2 Moo. & Rob. 423 (Erskine, J., said that the rule of discretion formerly prevailed, but now it was settled that the witness could not be excluded); 1852, Cobbett *v.* Hudson, 1 E. & B. 11 (Lord Campbell, C. J., said that "the better opinion" was that the judge could not exclude the witness).

[2] In the following citations the rule is understood to be laid down generally, except where the proviso is expressly noted; but in some of the rulings probably the proviso would have been stated if the facts had called for it: 1841, State *v.* Brookshire, 2 Ala. 303; 1853, Sidgreaves *v.* Wyatt, 22 id. 617; 1867, Montgomery *v.* State, 40 id. 684, 687; 1870, Bell *v.* State, 44 id. 393, 395; 1875, Wilson *v.* State, 52 id. 299, 303; 1892, Thorn *v.* Kemp, 98 id. 417, 423; 1895, Sanders *v.* State, id. 16 So. 935; 1855, Pleasant *v.* State, 15 Ark. 624; 1858, Golden *v.* State, 19 id. 590, 597 ("the right of excluding witnesses for disobedience, though well established, is rarely exercised;" here, not exercised against one who was not known to be needed); 1874, Bird *v.* State, 50 Ga. 585, 588; 1881, Butts *v.* State, 66 id. 508, 513, *semble;* 1881, Lassiter *v.* State, 67 id. 739, *semble* (see the construction of this case in Grant *v.* State, *infra*); 1886, Etheridge *v.* Hobbs, 77 id. 531, 534; 1887, Carson *v.* State, 80 id. 170, *semble;* 1890, Bone *v.* State, 86 id. 108, 121; 1892, Grant *v.* State, 89 id. 393; 1893, Pergason *v.* Etcherson, 91 id. 785, 787; 1880, Bulliner *v.* People, 95 Ill. 394, 399; 1896, Goon Bow *v.* People, id. 43 N. E. 593; 1850, Porter *v.* State, 2 Ind. 435; 1860, Jackson *v.* State, 14 id. 327; 1875, Davenport *v.* Ogg, 15 Kan. 366 (may be excluded if the party abets the disobedience); 1886, Haskins *v.* Com., Ky. 1 S. W. 730; 1860, State *v.* Gore, 15

Courts seem to forbid in general terms the disqualification of the witness; though in some of them it can hardly be doubted that a proviso as to the party's connivance would be enforced.[1] On the whole, then, the Courts occupy a common ground where there has been fault in the party; at one extreme stand a few Courts denying disqualification even in that case; at the other extreme stand probably the majority of Courts, permitting disqualification even without the party's fault.

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La. An. 79; 1884, State *v.* Watson, 36 id. 148; 1886, State *v.* Cole, 38 id. 843, 845; 1893, State *v.* Hagan, 45 id. 839, 841; 1895, State *v.* Jones, id. 18 So. 515; 1897, Com. *v.* Crowley, Mass. 46 N. E. 415 (excluded, in the trial Court's discretion, where the counsel was in fault in knowingly allowing the witness to stay); 1897, People *v.* Piper, Mich. 71 N. W. 175 (not excluded, if party is not conniving); 1852, Sartorious *v.* State, 24 Miss. 602, 608; 1835, Dyer *v.* Morris, 4 Mo. 214, 218; 1840, Keith *v.* Wilson, 6 id. 435, 441 (except where the party is not in fault by laches or connivance); 1860, State *v.* Fitzsimmons, 30 id. 236, 239; 1888, O'Bryan *v.* Allen, 95 id. 68, 74 (like Keith *v.* Wilson); 1894, State *v.* Gesell, 124 id. 531, 536 (same); 1895, State *v.* David, id. 33 S. W. 28; 1900, State *v.* Sumpter, id. 55 S. W. 76 (inadvertent violation, without party's connivance, no ground for exclusion); 1849, Laughlin *v.* State, 18 Oh. 99, 101; 1883, Dickson *v.* State, 39 Oh. St. 73, 77 (except where there has been no procurement or connivance of the party); 1879, Hubbard *v.* Hubbard, 7 Or. 42, 47 (unless there is complicity by the party); 1836, Earls' Trial (Pa.), 10; 1833, Anon., 2 Hill S. C. 251, 255 (except where there is no fault in the party); 1880, Smith *v.* State, 4 Lea 428, 430 (the discretion was held improperly exercised to exclude a witness unknown to the party at the time of the order); 1874, Goins *v.* State, 41 Tex. 334, 336, *semble;* 1875, Sherwood *v.* State, 42 id. 498, 501; 1878, Ham *v.* State, 4 Tex. App. 645, 673; 1880, Walling *v.* State, 7 id. 625; Estep *v.* State, 9 id. 366, 370; 1881, Avery *v.* State, 10 id. 199, 213; 1886, Hill *v.* State, id. 3 S. W. 763, *semble;* 1173, Holder *v.* U. S., 150 U. S. 91 (may be excluded in discretion, but not merely and always for violation).

[1] 1862, People *v.* Boscovitch, 20 Cal. 436; 1853, Johnson *v.* State, 14 Ga. 55, 61 *semble;* 1880, Rooks *v.* State, 65 id. 330; 1895, Cunningham *v.* State, id. 22 S. E. (954 distinguishing Pergason *v.* Etcherson, 91 Ga. 785); 1859, Horne *v.* Williams, 12 Ind. 326 (undecided); 1883, Davis *v.* Byrd, 94 id. 525 (at least where the party himself is not in fault; repudiating prior intimations to the contrary); 1884, Burk *v.* Andis, 98 id. 59, 64 (same); 1887, State *v.* Thomas, 111 id. 515 (same); 1860, Grimes *v.* Martin, 10 Ia. 347, 349; 1899, Parker *v.* Com., Ky. 51 S. W. 573 (a co-indictee remained, the defendant not explaining that he wished to use the other as a witness; disqualification of co-defendant held erroneous on the facts); 1887, Parker *v.* State, 67 Md. 329, 331; 1897, Ferguson *v.* Brown, Miss. 21 So. 603; 1898, Timberlake *v.* Thayer, id. 23 So. 767; 1866, State *v.* Salge, 2 Nev. 321, 326; 1819, State *v.* Sparrow, 3 Murph. 487; 1824, Woods *v.* M'Pheran, Peck 371, *semble;* 1849, Hopper *v.* Com., 6 Gratt. 684 (obscure); 1879, Hey's Case, 32 id. 946, 948, *semble;* 1894, Brown *v.* Com., 90 Va. 671, 675; 1869, Gregg *v.* State, 3 W. Va. 705, *semble.*